

TRANSCRIPT OF PROCEEDINGS

SUPREME COURT OF THE UNITED STATES

DECEMBER TERM, 1904

No. 100,000

ARTHUR LYMAN AND ARTHUR T. LYMAN, APPELLANTS,
UNDER THE LAST WILL AND TESTAMENT OF
BATT BEAKER, DECEASED, APPELLANTS.

INTERBOROUGH RAPID TRANSIT COMPANY, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE DISTRICT OF
THE DISTRICT OF COLUMBIA.

DECEMBER TERM, 1904.

[REDACTED]

(22.022)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 796.

ARTHUR LYMAN AND ARTHUR T. LYMAN, AS TRUSTEES
UNDER THE LAST WILL AND TESTAMENT OF GEORGE
BATY BLAKE, DECEASED, APPELLANTS,

vs.

INTERBOROUGH RAPID TRANSIT COMPANY ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK.

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1 *Bill of Complaint.*

In the Circuit Court of the United States, Southern District of New York.

In Equity.

ARTHUR LYMAN and ARTHUR T. LYMAN, as Trustees under the Last Will and Testament of George Baty Blake, Deceased, Complainants,

v.

INTERBOROUGH RAPID TRANSIT COMPANY, AUGUST BELMONT, Edward J. Berwind, Horace M. Fisher, Andrew Freedman, Edwin Hawley, Gerald L. Hoyt, James Jourdan, Gardiner M. Lane, John Pierce, William A. Read, Theodore P. Shonts, Alfred Skitt, Francis de C. Sullivan, Cornelius Vanderbilt, and George W. Young, Defendants.

To the Judges of the Circuit Court of the United States for the Southern District of New York, Sitting in Equity:

Arthur Lyman and Arthur T. Lyman, citizens of the Commonwealth of Massachusetts and residents of the City of Waltham, in said Commonwealth, alleging that they are the trustees under the Last Will and Testament of George Baty Blake, late of Boston, Massachusetts, deceased, and as such trustees are the owners of one hundred and fifty shares of the capital stock of the Interborough Rapid Transit Company, bring this their bill of complaint, in behalf of themselves and all other stockholders who are similarly situated, and who shall be entitled to avail themselves of the benefit of this suit against Interborough Rapid Transit

2 Company, a corporation created and existing under and by virtue of the laws of the State of New York, located and having its principal office for the transaction of business in the City of New York, in the Southern District of New York, Edward J. Berwind, Andrew Freedman, John Pierce, Theodore P. Shonts, Francis de C. Sullivan, Alfred Skitt, Cornelius Vanderbilt, Gerald L. Hoyt and William A. Read, all citizens of the State of New York and residents of the Southern District of said State, and August Belmont, Edwin Hawley and James Jourdan, citizens of the State of New York and residents of the Eastern District of said State, Horace M. Fisher and George W. Young, citizens of the State of New Jersey and residents of the District of New Jersey, and Gardiner M. Lane, a citizen of the Commonwealth of Massachusetts and a resident of the District of Massachusetts; and thereupon your orators complain and say as follows:

First. Your orators show that defendant Interborough Rapid Transit Company is a corporation duly organized and existing under and by virtue of the provisions of a certain act of the Legislature of the State of New York, entitled "An Act to amend Chapter Four

of the Laws of Eighteen Hundred and Ninety-one, entitled 'An Act to provide for rapid transit railways in cities of over one million inhabitants,' being Chapter 544 of the Laws of 1902.

3 Your orators further show that in and by said Act specific provision was made for the incorporation of companies to take over and exercise the rights and privileges connected with the leasing, operation and maintenance of any rapid transit railroad which might be constructed by a municipality under the provisions of said act, and that said defendant Interborough Rapid Transit Company was so incorporated for the express purpose of so leasing, operating and maintaining the rapid transit railroad in the City of New York, which is a municipal enterprise of the City of New York, and an instrumentality of government of the State of New York. Reference is prayed to said Act and to the Railroad Law of the State of New York, for the powers and duties of said defendant Interborough Rapid Transit Company and of its directors. The capital stock of said corporation now consists, and since the 26th day of August, 1902, has consisted of the sum of Thirty-five Million (35,000,000) Dollars, divided into three hundred and fifty thousand (350,000) shares of the par value of One Hundred Dollars each.

Second. Your orators further show that the said defendant Interborough Rapid Transit Company was duly incorporated May 6, 1902, for the purpose, among others, of equipping, operating and maintaining the rapid transit railroad in the City of New York then in process of construction under a contract made pursuant to the provisions of "An Act to provide for rapid transit railways in cities of over one million inhabitants," above referred to, and dated February 21, 1900, between the City of New York (acting by its Board of Rapid Transit Railroad Commissioners), and John B.

4 McDonald, which contract is known as Rapid Transit Contract No. 1. That by written assignment, dated July 10, 1902, the said McDonald, with the consent of the City of New York, duly assigned to Interborough Rapid Transit Company the leasing and operating provisions of said contract, and that by the terms of such assignment and the contract Interborough Rapid Transit Company became obligated to furnish the necessary equipment and to operate and maintain the railroad constructed thereunder. Your orators show upon information and belief that the defendant Interborough Rapid Transit Company commenced the operation of the railroad constructed under said Principal Contract No. 1 on or about the 21st day of October, 1904, and has continuously operated it since that date.

Your orators further show that the defendant Interborough Rapid Transit Company also operates the rapid transit railroad in the City of New York built as an extension of the railroad constructed under said Rapid Transit Contract No. 1, known as the "Brooklyn Extension." That such railroad was constructed under a contract made pursuant to the provisions of "An Act to provide for rapid transit railways in cities of over one million inhabitants," above referred to, and dated July 21, 1902, between the City of New York (acting by

its Board of Rapid Transit Railroad Commissioners) and Rapid Transit Subway Construction Company, a corporation of the State of New York, known as Rapid Transit Contract No. 2. That by written assignment dated August 10, 1905, said Rapid Transit Subway Construction Company, with the consent of the City of New York, duly assigned to Interborough Rapid Transit Company the leasing and operating provisions of said contract; and that by

5 the terms of such assignment and contract, Interborough Rapid Transit Company became obligated to furnish the necessary equipment, and to operate and maintain the railroad constructed thereunder. Your orators show upon information and belief that the defendant Interborough Rapid Transit Company commenced the operation of the railroad constructed under said Principal Contract No. 2 on or about the 16th day of January, 1905, and has continuously operated it since that date.

Your orators further show that the rapid transit railroad or "subway" in the City of New York constructed under the two contracts above mentioned and now operated by the Interborough Rapid Transit Company constitute one complete system extending from the intersection of Atlantic and Flatbush Avenues in the Borough of Brooklyn, through and under certain streets in said borough, and under the East River to the southerly end of Manhattan Island, and thence through and under various streets in the Borough of Manhattan in a northerly direction to terminii at 242nd Street and Broadway in the Borough of The Bronx, and 180th Street and Boston Road in the Borough of The Bronx.

Your orators further show that said defendant Interborough Rapid Transit Company operates the system of elevated railways of the Manhattan Railway Company in the Boroughs of Manhattan and The Bronx, in accordance with the terms of a lease from the Manhattan Railway Company to the Interborough Rapid Transit Company, dated January 1, 1903. Said defendant has continuously operated said system of elevated railways since April 1, 1903. That the system so operated extends in a northerly direction from South Ferry along Second, Third, Sixth and Ninth Avenues in the Borough of Manhattan to terminii at 155th Street and Eighth Avenue, Borough of Manhattan, and at 198th Street and

6 Webster Avenue in the Borough of The Bronx.

Your orators show, upon information and belief, that the said defendant Interborough Rapid Transit Company is the owner of a majority of the capital stock of the New York & Queens County Railway Company, a street surface railroad corporation operating lines of surface railroads entirely within the Borough of Queens, in the City of New York, and that it is also the owner of a majority of the capital stock of the New York City Interborough Railway Company, a street surface railroad corporation operating lines of surface railroads in the Boroughs of Manhattan and The Bronx, City of New York.

Your orators show that the business conducted by the defendant Interborough Rapid Transit Company is solely and exclusively that of transporting passengers for hire in the City of New York, and that it is not engaged in the transaction of any business between the

State of New York and any foreign country, or between the State of New York and any other of the United States.

Third. Your orators show that the rapid transit railroads in the City of New York constructed under the said Rapid Transit Contracts Nos. 1 and 2 and operated by the defendant Interborough Rapid Transit Company are owned by the City of New York, which is a municipal corporation of the State of New York, and that the only interest of said defendant Interborough Rapid Transit Company therein is as lessee for a term of years. Under the terms

7 of the lease of said rapid transit railroads the defendant is required to pay as rental annually the interest accruing upon the bonds of the City of New York, the proceeds of which were used for the construction of such railroads, and also an annual payment or percentage as a sinking fund which will be used to redeem those bonds prior to the termination of the original term of the lease of said rapid transit railroads in 1954.

Your orators further show that Section 35 of the "Act to provide rapid transit railways in cities of over one million inhabitants", as it existed at the time of entering into each of the two contracts above referred to, provided as follows:

"SEC. 35. The equipment to be supplied by the person, firm or corporation operating any such road shall include all rolling stock, motors, boilers, engines, wires, ways, conduits and mechanisms, machinery, tools, implements and devices of every nature whatsoever used in the generation or transmission of motive power, and including all power houses and all apparatus and all devices for signalling and ventilation. Such person, firm or corporation shall be exempt from taxation in respect to his, their or its interest under said contract, and in respect to the rolling stock and all other equipment of said road, but this exemption shall not extend to any real property which may be owned or employed by said person, firm or corporation in connection with the said road."

That each of the two rapid transit contracts which were assigned to the defendant Interborough Rapid Transit Company contained provisions exempting the person, firm or corporation operating the railroads constructed under said contracts from all taxation on their interest therein, by language which is practically identical with said Section 35. That by Chapter 597 of the Laws of 1905, Section 35

8 of the "Act to provide rapid transit railways in cities of over one million inhabitants" was amended by omitting the exemption provision, but by Section 3 of the said amending act any rights which might have accrued under the acts amended as to railroads already constructed, constructing or contracted for, were preserved and continued in full force and effect. Your orators therefore aver that in and by the provisions of said Section 35 and the two Rapid Transit Contracts, there exists a valid agreement between the State of New York, the City of New York, and the defendant Interborough Rapid Transit Company, exempting said company from any and all taxation in respect to its interest in the rapid transit railroads in the City of New York. This exemption from taxation has recently been upheld by the Court of Appeals of the

State of New York in the proceeding instituted by the defendant company to review a special franchise tax assessed against it by reason of its interest in the said rapid transit railroad.

Fourth. Your orators further show that in and by the acts of the legislature of the State of New York above referred to, and in accordance with which the defendant company was incorporated, and in accordance with the duly adopted by-laws of the said company, it is, among other things, provided that the stock, property, affairs and concerns of said defendant company should be managed and wholly conducted by fifteen directors. That such directors should hold office until others were chosen in their stead, and that such directors should be stockholders in the company in their own right

9 and likewise citizens of the United States. As your orators are informed and verily believe, the defendants above named, Edward J. Berwind, Andrew Freedman, John Pierce, Theodore P. Shonts, Francis de C. Sullivan, Alfred Skitt, Cornelius Vanderbilt, Gerald L. Hoyt and William A. Read, all citizens of the State of New York and residents of the Southern District of said State, and August Belmont, Edwin Hawley and James Jourdan, citizens of the State of New York and residents of the Eastern District of said State, Horace M. Fisher and George W. Young, citizens of the State of New Jersey and residents of the District of New Jersey, and Gardiner M. Lane is a citizen of the Commonwealth of Massachusetts and a resident and inhabitant of the District of Massachusetts, and that said defendants are the directors of the said defendant Interborough Rapid Transit Company, duly elected as such and are now acting in that capacity and are managing and conducting all and singular the affairs, stock, property and concerns of the said defendant Interborough Rapid Transit Company.

Fifth. Your orators further show, as has been alleged above, that the capital stock of the defendant Interborough Rapid Transit Company consists of Thirty-five Million (35,000,000) Dollars, and that its average indebtedness during the year ending December 31, 1909, was \$36,677,367, which consisted of \$23,771,833 of 6% notes due March, 1911, and \$6,633,637 of 5% notes due September, 1909, and \$6,239,167 of 5% forty-five year gold bonds secured by mortgage upon all the real estate and personal property owned by said defendant and also upon its interest in the lease of said rapid transit
10 railroads and in the lease from the Manhattan Railway Company, and which total average indebtedness was in excess of the total amount of the paid-up capital stock of said defendant, to wit, \$35,000,000. That the interest upon said bonds and notes for the year ending December 31, 1909, will exceed the sum of \$2,075,000. That in addition to the said interest upon its own bonded indebtedness, the interest which the defendant pays upon the City bonds issued for the construction of the rapid transit railroads which it operates will exceed for the year ending December 31, 1909, the sum of \$1,393,700. That the net earnings of the corporation for the year ending December 31, 1909, exclusive of said payments of interest upon its own bonds, and upon those of the City of New York, and of rental paid to Manhattan Railway Company, will be about \$15,732,666.

Sixth. Your orators further show that they are citizens of the Commonwealth of Massachusetts and residents of the City of Waltham in said Commonwealth, and that they are the trustees under the last will and testament of George Baty Blake, late of Boston in the Commonwealth of Massachusetts, deceased, and that as such trustees they became the owners and registered holders of one hundred and fifty shares of the capital stock of said defendant Interborough Rapid Transit Company, during December, 1905, and that since that time your orators have been and still are stockholders in said company, owning and holding as such trustees said one hundred and fifty shares of the capital stock of said defendant, the value of which exceeds the sum of \$25,000. The capital stock of said company is divided among a large number of different persons, who

as such stockholders constitute a large body, and this suit is
11 for an object common to them all. Your orators therefore bring this suit in their own name and in their own behalf as stockholders in said company, and also as representatives and on behalf of such of the other stockholders similarly situated and interested, if they may choose to intervene and become parties thereto.

Seventh. Your orators further show that, as they are informed and verily believe, defendant Interborough Rapid Transit Company and a majority of its directors who are managing and conducting its business, have announced that, under and by virtue of the alleged authority of the provisions of an Act of Congress of the United States entitled "An Act to provide revenue, equalize duties and encourage the industries of the United States, and for other purposes," approved August 5, 1909, they intend to voluntarily make and file with the Collector of Internal Revenue, prior to the 1st day of March, 1910, a return or statement showing in detail the amount of the net earnings or profits of Interborough Rapid Transit Company for the year ending December 31, 1909, and to voluntarily pay to the said Collector of Internal Revenue, before the first day of July, 1910, a tax of one per cent on the net earnings or income of the said defendant, for the calendar year ending December 31, 1909.

That in and by said act, every corporation now or hereafter
12 organized under the laws of the United States or of any State or territory of the United States, or under the acts of Congress applicable to Alaska or the District of Columbia, or now or hereafter organized under the laws of any foreign country, and engaged in business in any State or territory of the United States, or in Alaska or in the District of Columbia, is made subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation equivalent to 1% upon the entire net income over and above Five Thousand (5,000) Dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon the stock of other corporations, subject to tax imposed by that act. That the net income upon which the tax is to be measured is to be ascertained by deducting from the gross amount of such corporation received by it within the year from all sources, (1) all operating expenses, including rentals or franchise payments; (2) all losses not compensated by insurance, including depreciation allowance; (3) interest actually paid within the year

on its bonded or other indebtedness to an amount not exceeding the paid-up capital stock of such corporation; (4) all sums paid by it within the year for taxes imposed under the authority of the United States or any State; (5) all amounts received by it as dividends upon the stock of other corporations, subject to the tax imposed by the act.

13 Your orators further show that for the year ending December 31, 1909, the tax which the defendant Interborough Rapid Transit Company would have to pay upon its net income, arrived at as ascertained under the provisions of said Act, would, as your orators are informed and verily believe, exceed the sum of \$50,000. That in determining said net income, and by reason of the fact that the average debt of said defendant exceeds its capital stock to the amount of \$1,677,667, said Interborough Rapid Transit Company, to the extent of \$83,883, will be deprived of the benefit of deducting from its gross earnings the interest payable upon its bonds and notes in excess of the amount of its capital stock.

Eighth. Your orators aver that the provisions of said Act purporting to levy a special excise tax upon all corporations with respect to the carrying on or doing business by such corporations, and measured by a percentage upon their net income, determined as aforesaid, are unconstitutional, null and void, in that the said tax is in effect a tax upon the corporate existence of the defendant Interborough Rapid Transit Company, and is therefore a tax upon the exercise by the State of New York of sovereign powers, not surrendered to the United States, and clearly reserved to the State of New York under the Tenth Amendment to the Constitution of the United States.

Ninth. Your orators further aver that the said tax imposed upon the defendant Interborough Rapid Transit Company by the provisions of said Act of Congress, to the extent that it is measured by the income derived from the operation by the said company of the Rapid Transit railroad in the City of New York, as aforesaid, is a tax imposed upon the franchise of the said company to hold and
14 operate a municipal property, created and existing for the purpose of carrying on a municipal enterprise; that it is a tax upon the income derived by the said Interborough Rapid Transit Company from said property; that as such it is a tax upon an incident to said property and is a tax upon municipal property, and is therefore not a tax that can be lawfully imposed by the Congress of the United States under the Constitution of the United States.

Tenth. Your orators further aver that the provisions of the aforesaid Act of Congress imposing the said tax are unconstitutional, null and void, in that they are not uniform throughout the United States, as required in and by Section 8 of Article 1 of the Constitution of the United States, in that no power is conferred upon the Congress of the United States under any provision of the Constitution to impose a tax that is unequal and not uniform with respect to all classes of citizens and persons, whether natural or incorporate, engaged in the same general character of business or occupation; and in that the only power conferred upon the Congress to impose a tax is to

impose a tax levied upon the principle of equality and uniform apportionment among the persons taxed; and your orators aver that the said tax is not uniform, and is unequal, in the following respects:

(a) Because said tax is imposed upon corporations measured by a percentage upon the net earnings of said corporations, whereas no similar tax is imposed upon the income of either individuals or partnerships, although they may be engaged in the same general business.

(b) Because by said law a larger tax is imposed upon the
15 defendant Interborough Rapid Transit Company, by reason of the fact that its indebtedness exceeds the amount of its paid-up capital stock than upon other corporations engaged in the same general business whose capital stock exceeds their funded debt.

(c) Because labor, agricultural organizations, horticultural organizations, fraternal beneficiary associations, orders or associations operating under the lodge system, domestic building and loan associations organized and operated exclusively for the mutual benefit of their members, all of which are corporations, are specifically exempted in and by said act from all liability for the tax imposed thereby.

(d) Because all corporations whose net income for any one calendar year is less than or does not exceed Five Thousand (5,000) Dollars, are specifically exempted in and by said act from the imposition of the tax levied thereby.

Eleventh. Your orators further aver that the provisions of the aforesaid Act of Congress imposing said tax are unconstitutional, null and void in so far as the tax is imposed upon the defendant Interborough Rapid Transit Company, in that it impairs the obligation of the contracts between the defendant company, the City of New York and the State of New York, exempting the said company from all taxation by reason of its interest in the rapid transit railroad in the City of New York and by reason of its ownership of the equipment for said rapid transit railroad.

16 Twelfth. Your orators further aver that the franchise to operate the said rapid transit railroad and the franchise to operate the said elevated railway and structures, are, by the laws of the State of New York, defined to be real estate, and that substantially the entire income of the said company is derived from the said real estate and from other real estate owned in fee, and from cars, equipment, and other personal property; and that if said tax under the aforesaid law be construed as a tax upon income, the provisions of the act imposing said tax are unconstitutional, null and void, because it is a direct tax upon the income from real estate and personal property, and in effect upon the real estate and personal property itself, and is not apportioned among the several States according to population, as required by Sections 2 and 8 of Article 1 of the Constitution of the United States.

Thirteenth. Your orators further aver that the provisions of said act imposing the said tax are unconstitutional, null and void, in that they impose a tax of one per cent upon the income of said Inter-

borough Rapid Transit Company which accrued prior to August 9, 1909, the date upon which said act became a law, in contravention of the provisions of the Constitution of the United States, Section 8, Article 1, providing that Congress should pass no ex post facto law.

Fourteenth. Your orators further aver that the said provisions of said act imposing said tax are unconstitutional, null and void, 17 in that all corporations thereby taxed may be compelled to produce and disclose their private books and papers in order to make them liable to a penalty or to forfeit their property in violation of Articles 4 and 5 of the Constitution of the United States.

Fifteenth. Your orators further show that this suit is not a collusive one to confer on a Court of the United States jurisdiction of a case of which it would not otherwise have cognizance; that they have duly requested the defendant company and its directors in writing to omit and refuse to pay and to refrain from paying said tax and to contest the constitutionality of said act and to refrain from voluntarily making returns and statements required by the provisions of said act and to apply to a court of competent jurisdiction to determine this company's liability under said act; and that a copy of said request is hereto annexed, marked Exhibit "A," and made a part of this bill of complaint; and that the said defendant company and a majority of its directors, after a meeting of the directors at which the matter and said request were formally read before them for action, have, as your orators are informed and verily believe, refused and still refuse, and do not intend to comply with your orators' request, and have resolved and intend to comply with all and singular the provisions of said Act of Congress and make and file returns and statements required thereby and pay said tax, without protest, upon all its net earnings, including therein its rents from real estate. A copy of the refusal of said company is hereto annexed as Exhibit "B" to this bill.

18 Sixteenth. Your orators further show that if the defendant company and its directors, as they propose and have declared their intention so to do, pay said tax out of the income and profits of the defendant company, they will thereby diminish the assets of said company and lessen the dividends thereon and the value of its shares.

Seventeenth. Your orators further show that the voluntary compliance with the provisions of said Act of Congress in so far as it imposes a tax upon the defendant, will expose the defendant company to a multiplicity of suits by and on behalf of its numerous shareholders, and that numerous suits will work irreparable injury to the business of the company and involve it in great and irreparable damage.

Eighteenth. Your orators further show that this is a suit of a civil nature in equity. That the matter in dispute exceeds, exclusive of interest and costs, the sum and value of Five Thousand (5,000) Dollars, and arises under the Constitution and laws of the United States; that this is furthermore a controversy between citizens of different States, and that your orators and other stockholders of said defendant company have no adequate remedy at law in the premises.

That the contemplated action by the defendant company and its directors, the individual defendants, is contrary to equity, and good conscience, and tends to the manifest wrong, injury and oppression of your orators in the premises.

Wherefore and in consideration whereof, and inasmuch as 19 by the strict rules of the common law, your orators are relievable only in a court of equity where matters of this nature are properly cognizable and relievable, your orators pray:

1. That it may be adjudged and decreed that the provisions of said Act of Congress, approved August 9, 1909, purporting to authorize a special excise tax upon the defendant Interborough Rapid Transit Company, with respect to the carrying on or doing business by such corporation, measured by a percentage upon its net income, are unconstitutional, null and void.

2. That the defendants, said Interborough Rapid Transit Company, its directors, officers and employes, be restrained from voluntarily complying with the provisions of said act and making the return or statement above referred to, or paying the tax aforesaid.

3. That your orators may have such other and further or different relief in the premises as to this court of equity may seem just and proper.

To the end, therefore, that the said defendants may, if they can, show why your orators should not have the relief herein and hereby prayed for, and may full, true, direct and perfect answer make to the best and utmost of their knowledge and belief, and that said Interborough Rapid Transit Company under its corporate seal, and said individual defendants to each and all of the matters and things in this bill of complaint contained, and that as fully and particularly as if the same were here repeated, paragraph by 20 paragraph, and they were especially interrogated thereunto:

may it please your Honors to grant unto your orators a *subpoena ad respondendum* issuing out of and under the seal of this Honorable Court, directed to the said defendants, Interborough Rapid Transit Company, August Belmont, Edward J. Berwind, Horace M. Fisher, Andrew Freedman, Edwin Hawley, Gerald L. Hoyt, James Jourdan, Gardiner M. Lane, John Pierce, William A. Read, Theodore P. Shonts, Alfred Skitt, Francis de C. Sullivan, Cornelius Vanderbilt and George W. Young, commanding them and each of them on a certain day and under a certain penalty, to be therein inserted, to appear before your Honors in this Honorable Court, and then and there, full and true, direct and perfect answer make to all and singular the premises, further to perform and abide by such further order and decree as to your Honors shall seem meet and proper, and also a writ of provisional and a writ of perpetual injunction to the same purport, tenor and effect as is hereinbefore set forth and prayed.

And your orators, as in duty bound, will ever pray, etc.

ARTHUR LYMAN,

ARTHUR T. LYMAN,

As Trustees under the Will of George Baty Blake,

Late of Boston, Complainants.

EVAN SHELBY,

Solicitor for Complainants.

21 COMMONWEALTH OF MASSACHUSETTS,
County of Suffolk, ss:

Arthur Lyman and Arthur T. Lyman, being severally duly sworn, depose and say: That they are the trustees under the last will and testament of George Baty Blake, deceased, and are the complainants above named; that they have read the foregoing bill of complaint and know the contents thereof, and that the same is true of their own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters they believe it to be true.

ARTHUR LYMAN.
ARTHUR T. LYMAN.

Subscribed and sworn to before me this 31 day of December,
1909.

[SEAL.]

WM. J. E. SANDER,
Notary Public.

22 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

I, Francis A. Campbell, of Boston, in said County, duly elected, qualified and sworn as Clerk of the Superior Court, for and within said County and Commonwealth, dwelling in Boston in said County, said Court being a Court of record with a seal which is hereto affixed, the records and seal of which Court I have the custody, do herein and hereby in the performance of my duty as said Clerk, certify and attest that Wm. J. E. Sander, before whom the annexed affidavit, proof or acknowledgement was taken and subscribed, is a Notary Public for, within, and including the whole of said Commonwealth, doing business in said County, duly appointed, commissioned, qualified, sworn and authorized by the laws of said Commonwealth to act as such; and also duly authorized by the laws of said Commonwealth to take affidavits and take and certify proofs of acknowledgement of deeds of conveyances for lands, tenements, hereditaments, lying and being in said Commonwealth; in any part thereof and to be recorded therein, wherever situated and however bounded; that he was at the time of taking the affidavit, proof or acknowledgement, hereto annexed, such Notary Public; that due faith and credit are and ought to be given to his official acts; that I am well acquainted with his signature and handwriting, and I verily believe that the signature to the said affidavit, proof or acknowledgement is genuine, and, further, that the annexed instrument is executed and acknowledged according to the laws of said Commonwealth.

Witness my hand and the seal of said Court at Boston, in said County and Commonwealth, this 31st day of December, A. D. 1909.

[SEAL.]

FRANCIS A. CAMPBELL, *Clerk.*

EXHIBIT "A."

Arthur Lyman, 60 State Street, Room 903.

Boston, Dec. 24, 1909.

DEAR SIR: We understand that corporations will shortly be required to file reports with the Federal officials, under the recent Act of Congress which imposed a special excise tax upon the net earnings of corporations, and we understand it is the intention of the officers of the Interborough Rapid Transit Company to comply with the provisions of the said law.

In view of the doubtful constitutionality of the said law, we herewith request the officers and directors of this company to take such steps as will prevent the voluntary compliance by the company with the provisions of said law, to refrain from making the returns and paying the taxes provided for thereunder, and to take such further steps as will contest the constitutionality of said law and properly protect the rights of the stockholders of the said company.

Very truly yours,

(Sgd.)

ARTHUR T. LYMAN,
ARTHUR LYMAN,
Trustees under the Will of George Baty Blake,
Late of Boston.

To the Board of Directors, Interborough Rapid Transit Co., 165 Broadway, New York.

EXHIBIT "B."

DECEMBER 29, 1909.

DEAR SIR: Your letter of the 24th instant, addressed to the Board of Directors of the Interborough Rapid Transit Company, was read and duly considered by the Directors at a meeting held today, and a Resolution, a copy of which I enclose, was adopted.

I remain,

Yours very truly,

T. P. SHONTS, *President.*

Messrs. Arthur Lyman and Arthur T. Lyman, Trustees, 60 State Street, Boston, Mass.

EXHIBIT "C."

The President laid before the company a request of Mr. Arthur Lyman, and Arthur T. Lyman, as Trustees, addressed to the Directors, under date of December 24, 1909, requesting the Directors of the Company to take steps to prevent the voluntary compliance by the Company with the provisions of the Act of Congress of August 5, 1909, imposing a special excise tax upon the net earnings of corporations, and to take such further steps as will test the constitutionality of said law and properly protect the rights of the stockholders of said company.

After consideration it was

Resolved: That it was inexpedient for the company, in the absence of a decision by the Supreme Court of the United States that the said law is unconstitutional, to subject the company to the penalties provided by the said law for non-conformity therewith; that the company will be unable to comply with the request of the Messrs. Lyman and that the President be directed to so notify them.

(Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed Feb. 11, 1910, John A. Shields, Clerk.

26

Demurrer.

Circuit Court of the United States, Southern District of New York.

In Equity.

ARTHUR LYMAN and ARTHUR T. LYMAN, as Trustees under the Last Will and Testament of George Baty Blake, Deceased, Complainants,

vs.

INTERBOROUGH RAPID TRANSIT COMPANY, AUGUST BELMONT, Edward J. Berwind, Horace M. Fisher, Andrew Freedman, Edwin Hawley, Gerald L. Hoyt, James Jourdan, Gardiner M. Lane, John Pierce, William A. Read, Theodore P. Shonts, Alfred Skitt, Francis de C. Sullivan, Cornelius Vanderbilt, and George W. Young, Defendants.

Demurrer of Interborough Rapid Transit Company and the Other Defendants Above Named to the Bill of Complaint of Arthur Lyman and Arthur T. Lyman, as Trustees under the Last Will and Testament of George Baty Blake, Deceased, the Above-named Complainants.

These defendants, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint contained to be true, in such manner and form as the same are therein set forth, and alleged, do demur to the said bill and for cause of demurrer show that it appears by the complainants' own showing in the said bill that they have not made or stated such a cause of action as does or ought to entitle them to any relief as is thereby sought or prayed for from or against the defendants or any of them, and that said bill does not contain any matter of equity wherein this Court can grant any decree or give the complainants any relief or assistance against these defendants or any of them.

27 Wherefore, and for divers other errors and imperfections in said bill, these defendants demur thereto and demand the judgment of this Honorable Court whether they shall be compelled to make any further or other answer to the said bill of complaint

herein, or to any of the matters and things therein contained and pray to be hence dismissed, with their reasonable costs in this behalf sustained.

JAMES L. QUACKENBUSH,
*Solicitor for Defendants, 165 Broadway,
Borough of Manhattan, New York City.*

I hereby certify that, in my opinion, the foregoing demurrer is well-founded in point of law and proper to be filed in the above cause.

JAMES L. QUACKENBUSH,
Solicitor for Defendants.

UNITED STATES OF AMERICA,
*State of New York,
City & County of New York, ss:*

Horace M. Fisher makes solemn oath and says that he is Secretary of Interborough Rapid Transit Company, one of the defendants above named, and that the foregoing demurrer is not interposed for delay.

HORACE M. FISHER.

Sworn to before me this 11th day of February, 1910.

EMIL PENSEL,
Notary Public, New York County.

(Endorsed:;) U. S. Circuit Court, Southern District N. Y., Filed Feb. 11, 1910, John A. Shields, Clerk.

28

Notice of Hearing.

Circuit Court of the United States, Southern District of New York

In Equity.

ARTHUR LYMAN and ARTHUR T. LYMAN, as Trustees under the Last Will and Testament of George Baty Blake, Deceased, Complainants,

vs.

INTERBOROUGH RAPID TRANSIT COMPANY, AUGUST BELMONT, Edward J. Berwind, Horace M. Fisher, Andrew Freedman, Edwin Hawley, Gerald L. Hoyt, James Jourdan, Gardiner M. Lane, John Pierce, William A. Read, Theodore P. Shonts, Alfred Skitt, Francis De C. Sullivan, Cornelius Vanderbilt, and George W. Young, Defendants.

SIR: You will please take notice that this cause will be brought to a hearing on the bill and demurrer filed therein before Honorable Alfred C. Coxe, Circuit Judge, on the 11th day of February 1910

at 2 o'clock in the afternoon, or as soon thereafter as counsel can be heard.

Dated, New York, February 11, 1910.

EVAN SHELBY,
*Solicitor for Complainants, 46 Cedar Street,
Borough of Manhattan, New York City.*

To James L. Quackenbush, Esq., Solicitor for Defendants, 165 Broadway, Borough of Manhattan, New York City.

(Endorsed:) Due service of a copy of the within is hereby admitted this 11th day of February, 1910.—James L. Quackenbush, Solicitor for Defendants.—U. S. Circuit Court, Southern District N. Y., Filed Feb. 11, 1910, John A. Shields, Clerk.

29

Final Decree.

At a Stated Term of the Circuit Court of the United States for the Southern District of New York, Held at the United States Post Office in the Court House Building in the Borough of Manhattan, City of New York, This 11th Day of February, 1910.

Present: Hon. Alfred A. Coxe, Circuit Judge.

In Equity.

ARTHUR LYMAN and ARTHUR T. LYMAN, as Trustees under the Last Will and Testament of George Baty Blake, Deceased, Complainants,

vs.

INTERBOROUGH RAPID TRANSIT COMPANY, AUGUST BELMONT, Edward J. Berwind, Horace M. Fisher, Andrew Freedman, Edwin Hawley, Gerald L. Hoyt, James Jourdan, Gardiner M. Lane, John Pierce, William A. Read, Theodore P. Shonts, Alfred Skitt, Francis De C. Sullivan, Cornelius Vanderbilt, and George W. Young, Defendants.

This cause having come on to be heard upon the bill and the demurrer thereto, and counsel having been heard in support of said demurrer and in opposition thereto, it is by the Court now here,

Ordered and decreed that the said demurrer be sustained and that the bill of complaint of the complainants above named be and the same is hereby dismissed with costs.

ALFRED C. COXE,
Circuit Judge.

Thereupon the above named complainants, stating that in this case the constitutionality of a law of the United States is drawn in question and in open court prays an appeal from the said
30 final decree direct to the Supreme Court of the United States, pursuant to the statute in such case made and provided, it is therefore further

Ordered that said appeal be and the same is hereby allowed as prayed for in open court.

Said defendants then admitted in open court due notice of the said appeal and duly waived service of any citation thereon.

ALFRED C. COXE,
Circuit Judge.

(Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed Feb. 11, 1910, John A. Shields, Clerk.

31 Circuit Court of the United States, Southern District of New York.

In Equity.

ARTHUR LYMAN and ARTHUR T. LYMAN, as Trustees under the Last Will and Testament of George Baty Blake, Deceased, Complainants,

vs.

INTERBOROUGH RAPID TRANSIT COMPANY, AUGUST BELMONT, Edward J. Berwind, Horace M. Fisher, Andrew Freedman, Edwin Hawley, Gerald L. Hoyt, James Jourdan, Gardiner M. Lane, John Pierce, William A. Read, Theodore P. Shonts, Alfred Skitt, Francis de C. Sullivan, Cornelius Vanderbilt, and George W. Young, Defendants.

Now comes the complainants above named, by Evan Shelby, their solicitor, and in connection with the complainants' petition of appeal from the final decree made and entered herein on the 11th day of February, 1910, dismissing the complainants' bill of complaint, with costs, make and file the following assignment of errors in pursuance of the statute and rule in such case made and provided.

First. That the Court erred in not holding that so much of the Act of Congress of the United States entitled "An Act to provide revenue, equalize duties and encourage the industries of the United States, and for other purposes" approved August 5, 1909, as relates to the levy and collection of a tax upon all corporations with respect to the carrying on or doing business by such corporations, measured by a percentage upon the net income of such corporation, as specified in Section 38, was unconstitutional, null and void in that such section violates Sections 2 and 8 of Article 1, Articles 4 and 5, and the tenth amendment to the Constitution of the United States.

32 Second. That the Court erred in not granting to the complainants the relief prayed in and by their bill or any part thereof.

Third. That the Court erred in sustaining the demurrer to said bill.

Fourth. That the Court erred in dismissing the said bill with costs.

Dated New York, February 11, 1910.

EVAN SHELBY,
*Solicitor for Complainants, 46 Cedar Street,
Borough of Manhattan, New York City.*

EVAN SHELBY,
Of Counsel.

(Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed Feb. 11, 1910, John A. Shields, Clerk.

33 *Bond.*

Circuit Court of the United States, Southern District of New York.

ARTHUR LYMAN and ARTHUR T. LYMAN, as Trustees under the Last Will and Testament of George Baty Blake, Deceased, Complainants,

vs.

INTERBOROUGH RAPID TRANSIT COMPANY, AUGUST BELMONT, Edward J. Berwind, Horace M. Fisher, Andrew Freedman, Edwin Hawley, Gerald L. Hoyt, James Jourdan, Gardiner M. Lane, John Pierce, William A. Read, Theodore P. Shonts, Alfred Skitt, Francis de C. Sullivan, Cornelius Vanderbilt, and George W. Young, Defendants.

Know all men by these presents, that The United States Fidelity and Guaranty Company, is held and firmly bound unto the above-named defendants, in the sum of five hundred dollars (\$500) to be paid to the said defendants; for the payment of which, well and truly to be made, it binds itself its successors and assigns, jointly and severally, firmly by these presents.

Sealed with its seals and dated the 11th day of February, in the year of our Lord, 1910.

The condition of this obligation is such that whereas the said defendants above named have obtained a decree in the circuit court of the United States for the southern district of New York, sustaining the defendants' demurrer and dismissing the bill of complaint of the complainants with costs, which said decree was entered on the 11th day of February, 1910; and whereas the said complainants, Arthur Lyman and Arthur T. Lyman, as said trustees, in order to obtain a reversal of the same, hath obtained the allowance in open court of a petition of appeal to the Supreme Court of the United States:

Now, therefore, if the above named Arthur Lyman and Arthur T. Lyman shall prosecute their said appeal to effect and if they fail to make their plea good shall answer all damages and costs, then

this obligation shall be void; otherwise the same shall remain in full force and virtue.

THE UNITED STATES FIDELITY AND
GUARANTY COMPANY,

[SEAL.] By SYLVESTER J. O'SULLIVAN, *Manager*.

Attest:

GEORGE A. HAYES, *Attorney-in-Fact*.

Approved by

ALFRED C. COXE,
Circuit Judge.

35 *Affidavit, Acknowledgment and Justification by the United States Fidelity and Guaranty Company.*

Fidelity, Judicial, Contract, Burglary.

STATE OF NEW YORK,

County of New York, ss:

Before me personally came Sylvester J. O'Sullivan, known to me to be the Manager of the United States Fidelity and Guaranty Company, the corporation described in and which executed the annexed bond of Arthur Lyman and Arthur T. Lyman, as Trustees, etc., as surety thereon, who being by me duly sworn, deposes and says that he resides in the City of New York, State of New York, and that he is the Manager of the said United States Fidelity and Guaranty Company, and knows the corporate seal thereof; that said Company is duly and legally incorporated under the laws of the State of Maryland; that said Company has complied with the provisions of the Act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of Arthur Lyman and Arthur T. Lyman, as Trustees, etc., is the corporate seal of the said United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the Board of Directors of said Company; and that he signed his name thereto by like order and authority as Manager of said Company; and that he is acquainted with George E. Hayes, and knows him to be Attorney-in-fact of said Company; and that the signature of said George E. Hayes, subscribed to said bond is the genuine handwriting of said George E. Hayes, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution, exceed its claims, debts and liabilities, of every nature whatsoever, by more than the sum of two million dollars (\$2,000,000.00).

[SEAL.]

SYLVESTER J. O'SULLIVAN.

Sworn to, acknowledged before me, and subscribed in my presence this 11th day of February, 1910.

DANIEL C. DEASY, [SEAL.]
Notary Public, New York County.

(Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed Feb. 11, 1910, John A. Shields, Clerk.

36 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, do hereby certify that the foregoing pages, numbered from one to thirty-five inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the cause entitled Arthur Lyman and Arthur T. Lyman, as Trustees under the Last Will and Testament of George Baty Blake, deceased, Complainants-Appellants, against Interborough Rapid Transit Company, August Belmont, Edward J. Berwind, Horace M. Fisher, Andrew Freedman, Edwin Hawley, Gerald L. Hoyt, James Jourdan, Gardiner M. Lane, John Pierce, William A. Read, Theodore P. Shonts, Alfred Skitt, Francis de C. Sullivan, Cornelius Vanderbilt and George W. Young, Defendants-Appellees, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 12th day of February, in the year of our Lord One Thousand Nine Hundred and Ten and of the Independence of the said United States the One Hundred and Thirty-fourth.

[Seal of U. S. Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS, *Clerk.*

37 [Endorsed:] United States Supreme Court. Arthur Lyman and Arthur T. Lyman, as Trustees under the Last Will and Testament of George Baty Blake, deceased, Compl'ts-Appellants, vs. Interborough Rapid Transit Company and others, Def'ts-Appellees. Transcript of record from the Circuit Court of the United States for the Southern District of New York.

Endorsed on cover: File No. 22,022. S. New York C. C. U. S. Term No. 793. Arthur Lyman and Arthur T. Lyman, as trustees under the last will and testament of George Baty Blake, deceased, appellants, vs. Interborough Rapid Transit Company et al. Filed February 16th, 1910. File No. 22,022.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 796.

ARTHUR LYMAN AND ARTHUR T. LYMAN, AS
TRUSTEES OF THE LAST WILL AND TESTAMENT OF
GEORGE BATY BLAKE, DECEASED, APPELLANTS,

vs.

INTERBOROUGH RAPID TRANSIT COMPANY
ET AL., APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO ADVANCE UNDER RULE 26.

*To the Honorable the Chief Justice and Associates of the
Supreme Court of the United States:*

1.

This appeal involves the constitutionality of the act of Congress of August 5, 1909, imposing an excise tax upon corporations proportionate to their net earnings. The con-

stitutionality of this law is raised in the case of *Flint vs. Stone Tracy Company et al.*, No. 747, and other cases which have been set down for hearing on March 14, 1910; but the present appeal contains certain features that are not embodied in any of those cases. The Interborough Rapid Transit Company, the defendant below, is a corporation organized under an act of the New York Legislature, known as "The Rapid Transit Act," for the express purpose of operating and maintaining a rapid transit railroad in the city of New York built with the city's money and owned by the city. Under the terms of the operating agreement with the city the Interborough Company is compelled to pay the interest upon the bonds issued by the city to defray the cost of construction and one per centum (1%) per annum of the principal amount, in the form of a sinking fund. The public character of the company is also shown by a provision of the act under which it was incorporated, exempting not only the rapid transit railroad itself from taxation, but also the Interborough Company's interest in the railroad and the equipment owned by the Interborough and employed in its operation. The funded debt of the Interborough Company also exceeds its capital stock.

2.

There are thus fairly presented the questions, over and beyond those presented by other pending appeals:

(a) Whether the tax is not a tax upon a corporation that is in effect an agency of a State government for the purpose of carrying on what is a municipal and therefore a State enterprise.

(b) Whether there is an unconstitutional inequality or discrimination against the defendant-appellee as compared with other corporations whose capital stock exceeds their funded debt, by reason of the fact that the Interborough's capital stock is less than its funded debt, and that it does

3

not, therefore, enjoy the advantage such other companies do of being able to deduct the *full* interest paid upon its funded debt, in ascertaining its net earnings under the law.

3.

The defendant, the Interborough Company, having refused to subject the company to the penalties for failure to comply with the provisions of the law requiring it to make returns and pay the tax in question, the action below was instituted against it by a non-resident stockholder, upon the ground that the act was unconstitutional for the reasons stated, and also under Article I, sections 2 and 8, and Articles IV and V of the Constitution of the United States and the Tenth Amendment thereto. The matter in dispute exceeds two thousand dollars (\$2,000).

4.

A demurrer to the complaint having been sustained, an appeal was prayed to this court and allowed; but unless the appeal can be heard and determined before June 30, 1910, the defendant will voluntarily pay the tax in question, and the complainants-appellant will be remediless and unable to obtain relief, even though this court should later determine the act to be unconstitutional.

5.

The complainants-appellant therefore pray this honorable court that this case be advanced upon the docket and set down for hearing on the 14th of March, 1910, at the same time that the case of *Flint vs. Stone Tracy Company* and the other cases involving the constitutionality of the act in question are to be heard.

Notice of this motion has been served on counsel for the

defendant-appellee, and proof of service filed with the clerk of this court.

Respectfully submitted,

RICHARD REID ROGERS,
Of Counsel for Appellants.

SUPREME COURT OF THE UNITED STATES.

ARTHUR LYMAN and ARTHUR T. LYMAN, *as Trustees of the
Last Will and Testament of George Baty Blake, Deceased,
Appellants,*

vs.

INTERBOROUGH RAPID TRANSIT COMPANY *et al.*, *Appellees.*

SIR: Please to take notice that on the bill of complaint and the demurrer herein, and on the decision of Mr. Justice Coxe, sustaining said demurrer and dismissing the bill of complaint with costs, the undersigned will move this honorable court, at its session on Monday, the 21st day of February, 1910, at the opening of court on that day, or as soon thereafter as counsel can be heard, for an order advancing this cause, under rule 26, so as to set the same down for argument on March 14, 1910.

Yours, etc.,

EVAN SHELBY,
*Solicitor for Appellants, 46 Cedar Street,
Borough of Manhattan, New York City,
New York.*

TO JAMES L. QUACKENBUSH, Esq., solicitor for appellees.
165 Broadway, New York city.

[Endorsed:] Supreme Court of the United States. Arthur Lyman and Arthur T. Lyman, as trustees of the last will and testament of George Baty Blake, deceased, appellants, *vs.* Interborough Rapid Transit Company *et al.*, appellees. Notice of motion. Evan Shelby, solicitor for appellants, 46 Cedar street, borough of Manhattan, the city of New York. New York. Due and timely service of the within notice of motion is hereby admitted this 15th day of February, 1910. James L. Quackenbush, attorney for appellees.

[Endorsed:] File No. 22,022. Supreme Court U. S., October term, 1909. Term No. 796. Arthur Lyman *et al.*, trustees, &c., app'ts, *vs.* Interborough Rapid Transit Co. *et al.* Motion to advance. Filed Feb. 16, 1910.